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CASE NO. 85—1641

In The Supreme Court of the United States

OCTOBER TERM, 1985

LINDA MULLIGAN,

Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHERYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Whether Ohio's personal injury statute of limitations for intentional torts should be applied to actions arising under 42 U.S.C. § 1983.

2. Whether Ohio's personal injury statute of limitations for intentional torts should be retroactively applied to Petitioner's claims, where retroactive application leads to the same result that would have occurred under previously existing statutes of limitations.

3. Whether Petitioner had a liberty interest protected by the due process clause of the Fourteenth Amendment where she was not terminated from employment and no dissemination was made to the public of allegedly defamatory documents in her personnel file.

4. Whether Petitioner had a property interest protected by the due process clause of the Fourteenth Amendment where she had no legitimate claim of entitlement to university wide tenure.

5. Whether due process would have been provided for Petitioner's property and liberty claims through the Ohio Court of Claims.

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STATUTES AND REGULATIONS INVOLVED

Section 1.51, Ohio Revised Code (R. App. A-3).

Section 2743.02, Ohio Revised Code (R. App. A-3).

Section 2743.03, Ohio Revised Code (R. App. A-5).

Section 2743.16, Ohio Revised Code (R. App. A-7).

Section 4112.051(A), Ohio Revised Code (R. App. A-7).

Faculty Handbook, § 1.3.1 (R. App. A-8).

Faculty Handbook, § 1.4 (R. App. A-8).

Resolution of the OSU Board of Trustees, Sept. 5, 1975, § C.4 (R. App. A-10).

Rules of the University Faculty, 21.03 (R. App. A-10).

STATEMENT OF THE CASE
Proceedings Below

In a complaint filed on October 20, 1983 in the United States District Court for the Southern District of Ohio, Eastern Division, Petitioner Linda Mulligan made the following allegations. She holds a Doctor of Philosophy Degree in Sociology. In 1973 she was hired as an Assistant Professor in the Department of Sociology of the Ohio State University (OSU). Since she was hired, her teaching assignments have been at OSU's regional campus in Marion, Ohio, where Mulligan has been a member of the faculty. In 1979, Mulligan was promoted to Associate Professor with tenure, a position that continues to the present time. As a member of the Marion regional campus faculty and the Department of Sociology faculty, she is subject to the same regulations and evaluation procedures as are faculty members on the Columbus campus.

Named as Defendants in the complaint were Francis Hazard, Kent Schwirian, S. Earl Brown, John T. Mount, W. Ann Reynolds, Kathryn T. Schoen, Dorothy W. Jackson, Diether H. Haenicke and John D. Jacob, all current or former OSU officials, and the OSU Board of Trustees.

Mulligan alleged four separate causes of action in the complaint. The first two causes of action were brought under 42 U.S.C. §§ 1983 and 1985. In the first Mulligan alleged that she was denied due process of law when in 1975, OSU inserted a provision in its Faculty Handbook that stated that tenure was campus specific; that is, tenure would be obtained only at the compus where a professor did his or her teaching. The second cause of action alleged that Defendant Schwirian wrote a letter to Mulligan in which he made false statements, thereby denying Mulligan her liberty to practice her profession without due process of law. The third cause of action was a pendent state law claim, alleging that the inclusion of the provision in the Faculty Handbook that tenure was campus specific breached Mulligan's contract with OSU. The fourth cause of action alleged in a non-specific manner that Defendants had tortiously interferred with Mulligan's contract with OSU.

On May 15, 1984, the Court entered summary judgment for Defendants, holding that Mulligan did not have a property interest in university wide tenure to support a claim of denial of property without due process, the alteration of the Faculty Handbook did not deny Mulligan a protected liberty interest, and the Court would not exercise pendent jurisdiction over Mulligan's state law claims.[1] (App. 13).

On appeal, the United states Court of Appeals for the Sixth Circuit affirmed the judgment, holding that Mulligan's property and all of her liberty claims, with one exception, were barred by the applicable statute of limitations. The Court also found that one allegedly defamatory letter not barred by the statute of limitations had not denied Mulligan a protected liberty interest. *Mulligan v. Hazard,* 777 F. 2d 340 (6th Cir. 1985).

Statement Of The Facts

The facts in the record relevant to the issues on appeal are as follows.

Mulligan has been employed continuously by OSU since October 1, 1973, with her teaching duties being performed exclusively at the Marion regional campus. The previous year, she taught at the Marion regional campus on a part-time basis.

For each of the years that she has been employed at OSU, Mulligan has signed a contractual form entitled "notice of appointment" (NOA). Each of these NOA forms is signed by the Secretary of the OSU Board of Trustees and Mulligan. Each of the forms sets forth the basic contractual relationship between OSU and Mulligan, including salary, position, department, and period of time for which the services are to be performed. Each form is for a period of not more than three school quarters. For each year at OSU, Mulligan signed a new NOA.

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[1] Respondents also argued in their motion for summary judgment that the complaint was barred by the applicable statute of limitations and that process was available for Mulligan's due process claims in the Ohio Court of Claims.

For the 1973-74 and 1974-75 school years, the NOA's contained the following provision:

> The pertinent provisions of the Revised Code of Ohio, of the By-Laws of the Board of Trustees, of the Rules for the University Faculty and of the Official Actions of the Board of Trustees are expressly incorporated herein and this agreement is conditioned upon full compliance therewith.

Starting with the 1975-76 school year, a slightly different NOA henceforth included this language: "Your employment pursuant to this appointment is subject. . .to compliance with the laws of Ohio, the rules and regulations of the Board of Trustees, and the general personnel policies of the University."

Among the provisions of the Rules of the University Faculty incorporated by reference into the NOA's is the following reference to the NOA form in Rule 21.03. "Neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment." (R. App. A-10)[2]

Also incorporated by reference into the NOA's is the Faculty Handbook, which sets forth many of the general personnel policies of OSU.[3] Section 1.4 of the Handbook states in part that the "University does not assume any continuing obligation to renew the appointment of a non-tenured faculty member." (R. App. A-8).

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[2] References to Petitioner's appendix are to "App." References to the appendix attached to Respondents' brief are to "R. App.".

[3] Contrary to the derisive reference made at page 16, n. 17 of the petition for writ of certiorari that the Faculty Handbook is a "welcome wagon publication produced by the OSU office of public relations," the Handbook is published by the OSU Office of Academic Affairs and contains information regarding the university-faculty relationship, instructional standards, research facilities, academic organization and university services.

On September 5, 1975, the OSU Board of Trustees passed a resolution ratifying, approving and adopting the policies and procedures contained in a booklet entitled *Faculty Appointments, Promotions and Tenure.* Section C.4 of the booklet limits tenure to the campus where the primary service is rendered.

> The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). *Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.* (Emphasis added). (R. App. A-10).

This provision was also included in the 1975 Faculty Handbook as § 1.3.1. (R. App. A-8).

Mulligan did not obtain tenure at OSU until 1979, more than three years after the campus specific limitation on tenure was adopted by the Board of Trustees.

SUMMARY OF ARGUMENT

Wilson v. Garcia, ___ U.S. ___ , 105 S. Ct. 1938 (1985) requires that the local state statute of limitations for personal injuries be applied to all § 1983 actions. In Ohio, that statute is § 2305.11, Ohio Revised Code, which provides a one-year statute of limitations.

The one-year statute of limitations was properly applied retroactively to Mulligan's claims. The statute of limitations applied did not overrule clear past precedent, serves the purpose of providing a uniform statute of limitations for all § 1983 actions, and does not produce an inequitable result in Mulligan's case. The complaint in this case was also barred by

the statutes of limitations that would have been applied prior to *Wilson.*

Mulligan was not deprived of a liberty interest protected by the due process clause by the allegedly defamatory letters placed in her personnel file, because she has not been terminated from employment.

Mulligan does not have a property interest protected by the due process clause because she does not have a legitimate claim of entitlement to university wide tenure.

Due process is available through the Ohio Court of Claims for Mulligan's claims of being denied liberty and property without due process of law.

ARGUMENT

I. The Decision Of The Court Of Appeals Is Consistent With This Court's Decision In *Wilson v. Garcia,* ___ U.S. ___, 105 S. Ct. 1938 (1985).

In *Wilson v. Garcia,* ___ U.S. ___, 105 S. Ct. 1938 (1985), the Court held that for all actions arising under 42 U.S.C. § 1983, a federal court must apply the personal injury statute of limitations of the state in which the court is sitting. The Court of Appeals in this case noted that in Ohio, there are two statutes of limitations that are applied to personal injury actions. *Mulligan v. Hazard,* 777 F. 2d 340, 343 (6th Cir. 1985). Section 2305.11, Ohio Revised Code provides a one-year limitation period for personal injury resulting from libel, slander, assault, battery, malicious prosecution and malpractice.[4] (App. 29). A less specific provision, § 2305.10, Ohio Revised Code, contains a two-year statute of limitations to recover for bodily

[4] Subsequent to the filing of this lawsuit, § 2305.11, Ohio Revised Code was amended to delete the torts of assault and battery, which were concurrently included in a new statute, § 2305.111, Ohio Revised Code. This section retains the one-year limitations period for these torts. (App. 34).

injury. (App. 27). Under Ohio law, a specific statute controls over a more general statute if a conflict is perceived between the two. § 1.51, Ohio Revised Code. (R. App. A-3).

The Court of Appeals reasoned that the one-year provision for the intentional tortious conduct of assault and battery was the more appropriate of these two statutes to apply to § 1983 actions. 777 F. 2d at 344. The Court relied directly on *Wilson* for this conclusion. There, the Court emphasized that the genesis for § 1983 as it originated in the Civil Rights Act of 1871 was the intentional assaults and batteries perpetrated against persons during the previous century.

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Brisco v. LaHue,* 460 U.S. 325, 336-340, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents:
>
> > "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress." Cong. Globe, 42d Cong, 1st Sess, 374 (1871) (remarks of Rep. Lowe).

> By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement. ___ U.S. ___, 105 S. Ct. at 1947.

From this, it is apparent that not only is the Court of Appeals decision consistent with Wilson, but is indeed compelled by it.[5] By applying the Ohio statute of limitations for personal injuries resulting from intentional torts, "[i]t is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." ___ U.S. ___, 105 S. Ct. at 1949.

II. The Decision Of The Court Of Appeals Is Consistent With This Court's Decision In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

While *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) articulated three factors to be considered in determining the retroactive application of a statute of limitations, its continuing viability must be questioned in light of *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

In *DelCostello*, the Court retroactively applied a six month statute of limitations in an action by an employee against his employer and union. *DelCostello* established a uniform limitation period borrowed from federal law (§ 10b of the National Labor Relations Act) for such actions, where the previous borrowing of state statutes of limitations had resulted in varying limitations periods being applied, depending on the state whose statutes were borrowed and whether the action was against a union or an employer. This resulted in at least one of the petitioners in the case being barred from litigating his

[5] Even application of the two-year statute of limitations would not have preserved Mulligan's claim, since it arose in 1975, eight years before the complaint was filed.

claim against his union under the then-announced shorter limitation period, whereas under the existing application of a state statute of limitations his claim would not have been time-barred.

The Court did not discuss the three *Chevron* factors for determining retroactive application of a statute of limitations. Rather, the shorter statute of limitations was given direct and retroactive application to the petitioners in *DelCostello*.

Even if *Chevron* is still considered applicable to changes in statutes of limitations, the statute of limitations applied in this case is a proper subject for retroactivity. The first of the *Chevron* factors considers whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly established...." 404 U.S. at 106. Prior to the Court of Appeals' decision in this case, a variety of Ohio statutes of limitations had been applied to § 1983 actions, § 2305.07 (six years for employment discrimination) (App. 26) in *Mason v. Owens-Illinois, Inc.*, 517 F. 2d 520 (6th Cir. 1975); § 2305.09 (four years for search and seizure) (App. 27) in *Crawford v. Zeitler*, 326 F. 2d 119 (6th Cir. 1964); § 2305.11 (one year for false arrest and malicious prosecution) in *Kilgore v. City of Mansfield*, 659 F. 2d 632 (6th Cir. 1982); *Austin v. Bramer*, 555 F. 2d 142 (6th Cir. 1977); *Crawford v. Zeitler, supra;* and § 4112.051(A) (180 days for housing discrimination) (R. App. A-7) in *Sutton v. Bloom*, 710 F. 2d 1188 (6th Cir. 1983); *Warner v. Perrino*, 585 F. 2d 171 (6th Cir. 1978).

This diversity of statutes of limitations applied in civil rights actions by the Court of Appeals reveals that there was no clear past precedent that was overruled by the present case. Indeed, the total lack of uniformity indicates that there was no clear precedent at all. Since none of these cases were for a cause of action closely similar to the property claim made by Mulligan in this case, there was no previously existing statute of limitations case upon which she could have relied to

wait until 1983 to file a complaint for a cause of action she alleges accrued in 1975.[6]

The second *Chevron* factor looks to "whether retrospective operation will further or retard [the rule's] operation." 404 U.S. at 106-107. The rule announced in *Wilson* and applied in Ohio in *Mulligan,* applying a single statute of limitations to all § 1983 actions, serves the purpose of providing "uniformity, certainty and the minimization of unnecessary litigation." *Wilson,* ___ U.S. ___, 105 S. Ct. at 1947. As reviewed above, the prior experience in the Sixth Circuit alone amply demonstrates the need for a uniform statute of limitations. This important purpose will unquestionably be furthered by giving retroactive application to *Wilson* and *Mulligan.* It will hence be clear that all § 1983 claims will be subject to the same statute of limitations.

The third of the *Chevron* factors is whether applying the statute of limitations retroactively could produce a substantial inequitable result. 404 U.S. at 107. Retroactive application of a one-year statute of limitations would not produce an inequitable result in this case because Mulligan's claims were time-barred even under the statutes of limitation that would have been applied prior to *Wilson.*

Before *Wilson,* federal courts were to apply the most closely analogous state statute of limitations. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). Mulligan's claim of being denied property without due process accrued in 1975 when the OSU Board of Trustees passed a resolution making tenure campus specific. The same year, the campus specific provision was included in the Faculty Handbook made available to all faculty and incorporated by reference in Mulligan's NOA's.[7]

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[6] Even under *Board of Regents v. Tomanio,* 446 U.S. 483 (1980), which looked to the most closely analogous state limitations statute, § 2305.11, Ohio Revised Code would have been applied to Mulligan's liberty claim that false statements were made about her. This claim sounds in libel and is specifically included in § 2305.11.

[7] Mulligan's contention that her claim is continuing in nature is unavailing. The act of making tenure campus specific was a discrete and distinct occurrence that was completed in 1975. The act itself did not continue after 1975, only the result of the act. Tenure has remained campus specific since it was so designated in 1975.

Several possible statutes of limitations could have been applied to Mulligan's property claim. The most closely analogous may have been § 2305.10, Ohio Revised Code, which provides a two-year period for damages to personal property. Also possible would have been § 2305.09, Ohio Revised Code, a four-year catch-all provision for injury to the rights of a person. A further choice would have been the two-year period in § 2743.16, Ohio Revised Code for claims against the state if the property claim is considered in the nature of a breach of contract action.[8]

Mulligan's denial of liberty claim is in the nature or a libel action, which under Ohio law is "a false and malicious publication made with the intent to injure a person's reputation or expose him to public hatred, contempt, ridicule, shame or disgrace, or to affect him adversely in his trade or profession." *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.,* 43 Ohio App. 2d 105, 107 (1975). The most closely analogous Ohio statute of limitations is therefore § 2305.11, Ohio Revised Code, which provides a one year limitations period for libel. This would time-bar all of Mulligan's liberty claims with the exception of the allegedly defamatory April 8, 1983 letter excluded by the Court of Appeals from being barred by the statute of limitations. 777 F. 2d at 344-345.

Because the conclusion would have been the same in this case even under the pre-*Wilson* statute of limitations analysis, Mulligan is not subjected to an unfair and inequitable result by retroactively applying a one-year statute of limitations to her claims. Particularly with respect to her property claim, Mulligan cannot claim any injustice, since she waited until 1983 to file a complaint for a claim that accrued in 1975.

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[8] Mulligan's contract was with OSU, not with any of the named individual Respondents. The only state court where a breach of contract action could have been brought against OSU was the Ohio Court of Claims, which has exclusive state jurisdiction over actions against the state and its institutions. §§ 2743.02, .03, Ohio Revised Code. All such claims must be brought within the two-year period specified in § 2743.16, Ohio Revised Code.

Under no circumstances could § 2743.06, Ohio Revised Code (fifteen years for contract in writing) (App. 26) be applicable since Mulligan has been unable to demonstrate that any of the yearly written contracts she signed after 1975 and before she obtained tenure in 1979 contained a provision guaranteeing her university wide tenure.

For these reasons, the one-year statute of limitations was properly applied retroactively in this case.

III. Petitioner Was Not Deprived Of A Protected Liberty Interest.[9]

A public employee has a liberty interest that may be infringed where statements are made that "seriously damage his standing and associations in his community." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). This interest, however, can be implicated only where the employee has been terminated from employment.

Paul v. Davis, 424 U.S. 693 (1976) was a case where a person falsely identified as a shoplifter in a flyer sent by police to area merchants brought a § 1983 action against the police for deprivation of liberty without due process. While recognizing the plaintiff's allegations as a classic case of defamation, the Court refused to find an interference with a liberty interest. To reach this conclusion, the Court clarified its recognition of a public employee's liberty interest in *Roth.*

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.
>
> . . . .

[9] The remaining arguments in this brief were raised in the Court of Appeals, and although not discussed by that Court, can be asserted here to affirm the decision of the Court of Appeals. *Whitley v. Albers,* ___ U.S. ___, 106 S. Ct. 1078 (1986).

> Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee. *Paul,* 414 U.S. at 709-710.

Because Mulligan continues in employment at OSU even to this day, she could not have been deprived of a protected liberty interest by the documents in her personnel file referenced by the Court of Appeals. 777 F. 2d at 345.

IV. Petitioner Did Not Have A Protected Property Interest In University Wide Tenure To Serve As The Basis For A Claim Of Deprivation Of Property Without Due Process.

The inquiry into any due process claim requires a two part analysis: (1) whether the plaintiff was deprived of a protected life, liberty or property interest and (2) if there was a protected interest deprived, what process was due under the circumstances. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Ingraham v. Wright,* 430 U.S. 651 (1977). The requirements of due process do not apply unless the interest deprived is an interest protected by the Fourteenth Amendment. *Board of Regents v. Roth, supra.*

The due process clause itself does not create any property or liberty interests, but only extends procedural safeguards to certain independently existing interests. *Goss v. Lopez,* 419 U.S. 565 (1975); *Board of Regents v. Roth, supra.* These interests attain constitutional protection under the due process clause "by virtue of the fact that they have

been initially recognized and protected by state [or federal] law and . . . the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status." *Paul v. Davis*, 424 U.S. at 710.

The concept of a property interest within the meaning of the due process clause was examined in detail by the Supreme Court in *Board of Regents v. Roth, supra.*

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. *Id.* at 576.
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.* at 577.

In order to assert a legitimate claim of entitlement, a plaintiff must be able to articulate a specific federally or state created property right that is derived from a statute, legal rule or mutually explicit understanding. *Leis v. Flynt,* 439 U.S. 438 (1979). If the property interest is alleged to have arisen under state law, the sufficiency of the claim of entitlement must be decided by reference to state law. *Bishop v. Wood,* 426 U.S. 341 (1976).

In this case, Mulligan contends that the OSU Board of Trustees' decision in 1975 to limit tenure to the campus where primary service is rendered deprived her of a property right in university wide tenure, eventhough she did not obtain tenure until 1979. She alleges that this deprived her of due process of law because she did not have notice and an opportunity to be heard before this decision was made. In order to prevail in this case, Mulligan must necessarily prove that she had more than an abstract need or desire for university wide tenure. She must be able to prove that she had a legitimate claim of entitlement to university wide tenure derived from a statute, legal rule or mutually explicit understanding.

The NOA's signed by Mulligan since the 1975-76 school year state that her employment is subject "to compliance with the laws of Ohio, the rules and regulations of the Board of Trustees, and the general personnel policies of the University." Rule 21.03 of the Rules of the University Faculty limits all appointments "for a period not to exceed four academic quarters" and clarifies that "neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment." Also, the Faculty Handbook at § 1.4 states that nontenured faculty are appointed on a probationary basis, with the appointments "for a one-year period." Section 1.4 also specifically states that the "Unversity does not assume any continuing obligation to renew the appointment of a nontenured faculty member." These provisions are "rules and regulations of the Board of Trustees" or "general personnel policies of the University" that Mulligan agreed were applicable when she signed her NOA's for employment at OSU.

These provisions from the Rules of the University Faculty and the Faculty Handbook and the fact that Mulligan signed a new contract for each of her years at OSU demonstrate that each contract Mulligan entered into with OSU was for a period of time of no more than one year. Each year prior to 1979 she signed a new contract and each contract expired at the end of the one year or less period of time specified in the contract. Since Mulligan did not obtain tenure until 1979, OSU had no obligation until tenure was granted to renew each contract upon its expiration. Because a new contract was entered into for each year, each contract was separate and distinct and was subject to the various rules and policies of OSU that were in effect when each contract was signed.

For the school years 1976-77, 1977-78 and 1978-79, Mulligan signed a new NOA for each year. Each of those contracts was signed after the Board of Trustees adopted the campus specific tenure provision on September 5, 1975 and after the campus specific provision was included in the 1975 Faculty Handbook.

It is therefore evident that after the Board of Trustees' September 5, 1975 resolution and the 1975 Faculty Handbook were in effect, the campus specific provision became incorporated into Mulligan's contracts subsequently executed. Mulligan remained free to sign her contrcts with OSU after tenure became campus specific or to seek employment elsewhere. When she signed contracts in 1976, 1977 and 1978 prior to obtaining tenure, each of those contracts incorporated the provision from the 1975 Faculty Handbook and the Board of Trustees' resolution that tenure was campus specific. With each contract she signed, she agreed that if she would obtain tenure in the future, she would hold tenure only at the campus where her primary service was being rendered, the Marion regional campus.

From the foregoing, there is no genuine issue as to whether Mulligan had a legitimate claim of entitlement, derived from a statute, rule or mutually explicit understanding, to university wide tenure. She had no contractual right to university wide tenure when she received tenure in 1979. Indeed, the mutually explicit understanding stated in her contract with OSU is that when she obtained tenure in 1979, it would be applicable only to the Marion regional campus. Her desire for university wide tenure is no more than an abstract need or unilateral expectation. Mulligan therefore has no property interest in university wide tenure within the meaning of the due process clause definition of property. Because she has no property interest, she cannot prevail on her claim of being denied property without due process of law.

V. Assuming Petitioner Had Protected Property And Liberty Interests, Due Process Was Available Through The Ohio Court Of Claims For An Alleged Deprivation Of Those Rights.

Assuming, *arguendo,* that Mulligan had a property right in university wide tenure, and assuming that OSU's articulation in 1975 that tenure was campus specific deprived here of that right, the deprivation did not occur without due process of

law because Ohio has available a remedy in the Ohio Court of Claims for the deprivation.

In *Parratt v. Taylor,* 451 U.S. 527 (1981),[10] the Court considered the question of whether due process is provided where there exists a post-deprivation remedy in a state claims procedure. The plaintiff in *Parratt* was a prison inmate who claimed a due process violation by prison officials who had negligently lost hobby materials sent to the prisoner. The Court found that three of the prerequisites of a valid due process claim had been met — the defendants acted under color of state law, the hobby kit was property, and the loss of the kit amounted to a deprivation. *Id.* at 536. The Court then determined whether the deprivation had occurred without due process. After reviewing its prior decisions where post-deprivation remedies were found to meet due process standards, the Court held that there could be no claim of being denied due process where a state provided a remedy to a person with a claim against a state employee.

> The State provides a remedy to persons who believe they have suffered tortious loss at the hands of the State. See Neb. Rev. Stat. § 81-8.209 *et seq.* (Reissue 1976). Through this tort claims procedure the state hears and pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question but respondent did not use it. It is argued that the State does not adequately protect the respondent's interests because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the

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[10] *Parratt* was overruled in *Daniels v. Williams,* ___U.S. ___, 88 L. Ed. 2d 662 (1986) only to the extent that *Parratt* had held that due process claims could be based on negligent conduct.

> state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process. *Id.* at 543, 544.

The allegations in this case are that OSU altered the terms of Mulligan's tenure by making tenure campus specific. In essence, Mulligan's allegations are that her contract with OSU has been breached.

Ohio provides a remedy for persons with breach of contract actions against a state university through the Ohio Court of Claims. Effective January 1, 1975, the State of Ohio created the Ohio Court of Claims and consented to suit in that Court. §§ 2743.02, .03, Ohio Revised Code. The Court of Claims functions as a court of record, has full equitable powers, and operates pursuant to the Ohio Rules of Civil Procedure. § 2743.03, Ohio Revised Code. Pursuant to these provisions, Mulligan could have filed a breach of contract action against OSU after tenure was made campus specific in 1975.

Similarly, Mulligan could have pursued her liberty claim as a defamation action in the Court of Claims.

Consistent with *Parratt,* due process was available to Mulligan for her alleged property and liberty deprivations.

CONCLUSION

For the above-stated reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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COUNSEL OF RECORD FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing brief in opposition to the petition for a writ of certiorari have been served upon Petitioner Linda Mulligan by forwarding copies to her counsel, Frederick G. Cloppert, Jr., 225 E. Broad St., Columbus, Ohio 43215 by United States Mail, postpaid, this _____ day of May, 1986. I further certify that all parties required to be served have been served.

GENE W. HOLLIKER
Assistant Attorney General

CASE NO. 85—1641

In The Supreme Court of the United States

OCTOBER TERM, 1985

LINDA MULLIGAN,
Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHERYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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OHIO REVISED CODE

§ 1.51 Special or local provision prevails over general; exception.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

§ 2743.02 [State waives immunity from liability.]

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) In any circumstance in which a claimant proves in the court of claims that an officer or employee, as defined in division (A) of section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that

the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2734.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivision which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorneys' fees, damage, loss or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his or her duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or if such hospital requests of the superintendent of insurance, shall recommend, a specific amount for any given period of time that in his opinion represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action except a civil action for one thousand dollars or less, that is filed in the court of claims.

§ 2743.03 [Court of claims created.]

(A) There is hereby created a court of claims. The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code, exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims and of determinations pursuant to sections 5315.04 and 5315.05 of the Revised Code, and jurisdiction to hear appeals from the decisions of the court of claims commissioners. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counter-claims, cross-claims, and third-party claims.

(B) The court of claims shall sit in Franklin county, its hearings shall be public, and it shall consist of incumbent judges of the supreme court, courts of appeals, or courts of common pleas, or retired judges eligible for active duty pursuant to division (C) of Section 6 of Article IV, Ohio Constitution, sitting by temporary assignment of the chief justice of the supreme court. The chief justice of the supreme court may direct the court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.

(C) A civil action against the state shall be heard and determined by a single judge. Upon application by the claimant or the state, the chief justice of the supreme court may assign a panel of three judges to hear and determine a

civil action presenting novel or complex issues of law or fact. Concurrence of two members of the panel is necessary for any judgment or order.

An appeal from a decision of the court of claims commissioners shall be heard and determined by one judge of the court of claims.

(D) The Rules of Civil Procedure shall govern practice and procedure in all actions in the court, except insofar as inconsistent with this chapter. The supreme court may promulgate rules governing practice and procedure in actions in the court as provided in Section 5 of Article IV, Ohio Constitution.

(E)(1) A party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims. The petition shall state the basis for removal, be accompanied by a copy of all process, pleadings, and other papers served upon the petitioner, and shall be signed in accordance with Civil Rule 11. A petition for removal based on a counterclaim shall be filed within twenty-eight days after service of the counterclaim of the petitioner. A petition for removal based on third-party practice shall be filed within twenty-eight days after the filing of the third-party complaint of the petitioner.

(2) Within seven days after filing a petition for removal, the petitioner shall give written notice to the parties, and shall file a copy of the petition with the clerk of the court in which the action was originally brought. The filing effects the removal of the action to the court of claims, and the clerk of the court where the action was brought shall forward all papers in the case to the court of claims. The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party.

(3) Bonds, undertakings, or security and injunctions, attachments, sequestrations, or other orders issued prior to removal remain in effect until dissolved or modified by the court of claims.

§ 2743.16 [Time of accrual of cause of action.]

Civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties. The period of limitations shall be tolled pursuant to section 2305.16 of the Revised Code, except there shall be no tolling during imprisonment unless the imprisoned person is of unsound mind.

§ 4112.051 Actions in a common pleas court.

(A) The rights granted by division (H) of section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of common pleas. No person shall be compelled to be a witness against himself. A civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occured.

1.3.1 Campus Assignment

The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.

It is the policy of the University to achieve and maintain the highest possible quality of programs on each of the several campuses. Decisions regarding the selection, salary, assessment, promotion, assignment, and responsibilities of a regional campus faculty member should reflect full cooperation between the Columbus academic unit, which is responsible for instruction, and the regional campus administration. All formal recommendations (e.g., appointments, nominations for promotions or tenure, etc.) must bear the signature of the chairman of the Columbus campus academic unit, the dean of the college of instruction, the director of the regional campus, and the vice president for regional campuses.

1.4 Probationary Service, Duration of Appointments

In Section 1.6, probationary periods are established for regular faculty members with the rank of instructor, assistant professor, and associate professor. In determining the years served in these probationary periods, the following will not be credited toward the attainment of tenure: service on an adjunct, clinical, visiting, or lecturer appointment; service (with any title) on a special appointment, or part-time service at a level of less than 50 percent total service (as specified in one or more concurrent notices of appointment) to the University.

The period of a leave of absence may not be credited in the probationary period unless there is a written agreement to so credit it. Such an agreement will require the approval of the dean and of the provost.

The appointment of a person to a nontenured regular faculty position is probationary in nature. Appointments during the probationary period are for a one-year period and faculty members are normally reviewed annually during this period. It is during this time that persons have an opportunity to prove themselves to their peers; their record of accomplishments forms the basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

The University does not assume any continuing obligation to renew the appointment of a nontenured faculty member. Nonrenewal may be based upon such factors as changing standards of competence within a discipline, an assessment of inadequate performance or insufficient development, or any one of a number of less defined academic, financial, or policy reasons. The nonrenewal of an appointment in and of itself, however, should not carry with it the implication of either incompetence or misconduct on the part of the faculty member.

Decisions affecting the nonrenewal of a probationary appointment may not be arbitrary or capricious, or carried out in violation of a faculty member's right to academic freedom. Faculty Rule 21.08 provides a procedural mechanism under which an aggrieved probationary faculty member can challenge a nonrenewal decision which he believes to have been improper. In that instance, however, the burden of proof is on the probationary faculty member to establish that the nonrenewal decision was improper.

RESOLUTION OF THE OSU BOARD OF TRUSTEES, SEPT. 5, 1975, § C.4

Campus Assignment

The Ohio State University provides instructional programs at several locations including the central campus in Columbus, regional campuses in Lima, Mansfield, Marion, and Newark, the Graduate Center at Wright-Patterson Air Force Base (Dayton), and the Agricultural Technical Institute (Wooster). Members of the regular faculty who receive tenure while rendering primary service on a particular campus hold tenure only at that campus.

RULES OF THE UNIVERSITY FACULTY

21.03. Appointments and Continuing Employment; Conditions Upon.

Section 1. Upon nomination and recommendation by the president of the University, the Board of Trustees shall make all appointments to all positions within the University and approve the salaries therefor. Such appointments, for a period not to exceed four academic quarters, shall be evidenced by a notice of appointment signed by the Secretary of the Board and sent to the appointee for acceptance. The notice of appointment form is a budgetary convenience containing some detail relating to the employment relationship during the term of the appointment, such as salary, title, and the quarters during which service is to be rendered. The form is used for appointment to many and varied kinds of service, including appointment to positions which may be tenure accruing and others which are not. Neither the issuance of the notice nor its contents is intended to reflect any commitment by the Trustees as to the recipient's tenure or as to renewal of appointment.